In The
Supreme Court of the United States
October Term, 1977

No. 76-539

Montana Power Company, et al.,
Petitioners,

v.

United States Environmental Protection Agency, et al.,
Respondents.

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and Nos. 76-585, 76-594, 76-619, 76-603, 76-629

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF INTERVENOR RESPONDENTS SUGGESTING MOOTNESS

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MOTION OF INTERVENOR RESPONDENTS SUGGESTING MOOTNESS

On April 4, 1977, this Court granted petitions for writs of certiorari in the above-captioned proceedings. The order issued on that day limited the questions before the Court to the following:

> 1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act;
>
> 2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction.

Intervenor respondents Sierra Club, *et al.*, believe that the recently enacted Amendments to the Clean Air Act, P.L. 95-95, which were signed into law by the President on August 7, 1977, dispose of any doubt as to these two questions. Consequently, the case before this Court is essentially moot. To the extent that any questions might still be raised, they are not of a sufficient consequence to warrant review by this Court and, in any case, should first be considered by the lower court in the light of the new statute.

I

THE REGULATIONS OF THE ENVIRONMENTAL PROTECTION AGENCY

The regulations at issue here were promulgated by the Enviromental Protection Agency in December 1974. 39 Fed. Reg. 42509. The promulgation of these regulations was in response to the ruling in *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), affirmed per curiam, 4 ERC 1815, affirmed by an equally divided Court *sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973). That decision found that the policy of preventing signifi-

cant deterioration of existing clean air was part of the Clear Air Act and indeed had been part of that statute even before its amendment in 1970. 344 F. Supp. at 256. The stated purpose of the EPA regulations is the prevention of significant deterioration of air quality—that is, preventing air which is presently cleaner than would be allowed by the national ambient air quality standards adopted by EPA pursuant to the Clean Air Act of 1970, 42 U.S.C. 1857, *et seq.*, from becoming significantly dirtier.

The regulations issued by EPA were immediately challenged by the petitioners now before this Court.[1] The litigation brought before the Court of Appeals for the District of Columbia Circuit pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 1857h-5(b)(1), raised a number of issues concerning the regulations and their validity, including the two questions before this Court. The Court of Appeals rejected all challenges and found the regulations valid and reasonable in nearly all respects. *Sierra Club* v. *Environmental Protection Agency*, 540 F. 2d 1114 (1976), set out as an appendix to the Petition for Writs of Certiorari in Nos. 76-529. However, as to the question of the authority of Indian governing bodies and federal land managers to determine the air quality designation of lands under their control, the Court of Appeals found the issue not ripe for review. See Petition for a Writ of Certiorari, No. 76-529, App. A, p. 47a.

Generally, the regulations provide for a system of air quality classifications to limit increases in the level of

[1] Intervenor respondent Sierra Club also challenged the regulations on the ground that they were not fully adequate to carry out their purpose. This challenge was rejected by the Court of Appeals, which found the regulations reasonable, and the Sierra Club's petition for a writ of certiorari was denied by this Court. Order of April 4, 1977, No. 76-617.

two pollutants, sulphur dioxide and particulates, in clean air areas. 40 C.F.R. 52.21(c). Class I, which is the most restrictive, allows only small additional amounts of the two pollutants to be introduced into a clean air area. 40 C.F.R. 52.21(c)(2)(i). Class II allows a considerable additional amount of these two pollutants. Class III would allow pollution levels to rise to the lowest of the national ambient air quality standards. 40 C.F.R. 52.21(c)(2)(ii). All areas of the country were originally designated as Class II by EPA, but States and Indian governing bodies could redesignate lands under their jurisdiction as Classes I or III and federal land managers could redesignate from the existing classification but only to a more restrictive one. 40 C.F.R. 52.21(c)(3).

The regulations also establish a permit system under which major new sources of air pollution are required to demonstrate, prior to construction, that the emissions of sulfur dioxide and particulates which they will produce will not exceed the amounts of these pollutants allowed by the increments applicable to an area which the emissions would affect. 40 C.F.R. 52.21(d).

II

THE CLEAN AIR ACT AMENDMENTS OF 1977

On August 7, 1977, President Carter signed into law extensive amendments to the Clean Air Act, including detailed provisions for the prevention of significant deterioration of air quality. The amendments passed by the Congress, H.R. 6161 (123 Cong. Rec. H8507 (daily edition)), have two main effects on this litigation.

First, they establish detailed rules for preventing significant deterioration of clean air, including (1) a requirement that state implementation plans be developed to prevent significant deterioration of air quality (Sec.

161), (2) the adoption of applicable increments (Sec. 163(b)), (3) provision for the automatic designation of national parks, wilderness areas, and other similar areas as Class I areas where very little additional pollution will be allowed (Sec. 162(a)), (4) permission for States and Indian governing bodies to redesignate other areas (Sec. 164(c)), and (5) procedures for preconstruction review of major new sources of air pollutants (Sec. 165). These provisions are applicable as soon as a state implementation plan is issued for a particular area (Sec. 168(a)).

Second, the 1977 Amendments specifically adopt the present regulations and provide that they shall be in force until a state implementation plan has been developed, except where inconsistent with specific provisions of the bill:

Sec. 168(a). Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this Act prior to enactment of this part shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b).

(b) If any regulation in effect prior to enactment of this part to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a), then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deteriora-

tion in effect prior to the enactment of the Clean Air Act Amendments of 1977.[2]

It is readily apparent, from even a cursory comparison of the regulations and the 1977 Amendments, that both the essential structure and underlying philosophy of the regulations were adopted and incorporated in the final statute. Both the regulations and the 1977 Amendments provide for the use of an increment system based on land classifications. Both allow for redesignation by States and Indian governing bodies of the lands within their jurisdiction.[3] Both provide for preconstruction review of major new pollution sources to ensure that the applicable pollution increments will not be violated. However, even more important, Section 168 adopts virtually all the regulations for the period prior to the issuance of the implementation plans at which time the statutory provisions become effective.

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[2] The provisions of the 1977 Amendments which immediately amend and supersede the regulations deal with the mandatory Class I areas (Sec. 162(a)), the applicable increments (Sec. 163(b)), and the areas which are initially classified Class II but may be redesignated only to Class I (Sec. 164(a)). In addition, the amendments modify the definition contained in the regulations for the commencement of construction (Sec. 164(b)), a provision which governs which major new sources will be subject to review under the regulations and the statute.

[3] The role of the federal land manager has been changed from that of a redesignating authority (40 C.F.R. 52.21(c)(3)(iv)) to one offering recommendations for further designations of Class I lands and determining where certain variances from the statutory standards may, or may not, be permitted (Sec. 164(d), 165). The reason for the change in role is obviously that the statute itself provides for the protection of the most sensitive federal areas by actually making them Class I. Thus, the provision in the regulations which gave the federal land managers authority to redesignate only to a more restrictive classification (40 C.F.R. 52.21(c)(3)(iii), (iv)) and, in this fashion, provide protection for the sensitive lands under their jurisdiction will largely be unnecessary.

III

EFFECT OF THE 1977 CLEAN AIR ACT AMENDMENTS ON THE PROCEEDINGS BEFORE THIS COURT

It is a matter of basic law that this Court will review a case on the basis of the "law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972). The law regarding the prevention of significant deterioration of air quality, as it now stands, is the statute signed into law on August 7, 1977. From the date of that statute onward, the questions before this Court are entirely moot. There can be no doubt after that date whether the "regulations promulgated by the Environmental Protection Agency * * * are authorized by the Clean Air Act" (Question 1), or whether the "Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies powers to reclassify federal and Indian lands within their jurisdiction" (Question 2). During the interim period while the States are modifying their implementation plans to comport with the 1977 Amendments, the statute itself adopts and enacts the regulations with only minor adjustments to make them compatible with the provisions of the 1977 Act. After the plans are adopted, the statute, rather than the EPA regulations, will govern.

Insofar as the regulations applied prior to August 7, 1977, even if we assume *arguendo* that the 1977 Amendments did not constitute a ratification of the regulations as they existed prior to enactment,[4] intervenor respond-

[4] We submit that the 1977 Amendments do constitute such a ratification. Congress repeatedly reaffirmed during the consideration of this legislation that the Clean Air Act of 1970 prohibited the significant deterioration of air quality. See, *e.g.*, Clean Air Amendments of 1977, Senate Committee on Environment and Public Works, 95th Cong., 1st Sess. 28-29 (1977); Clean Air Act Amendments of 1977, No. 95-294, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 103-105; 123 Cong. Rec. H8665 (daily edition, August 4, 1977). It also reaffirmed the authority of EPA to issue regulations to enforce this requirement of the 1970 statute. See, *e.g.*, 123 Cong. Rec. H8664-8665 (daily edition, August 4, 1977). Moreover, the 1977 Amendments, by adopting virtually all of the EPA regulations for the interim period before issuance of the state implementation plans, clearly demonstrate Congress' approval of the EPA regulations.

ents submit that this case should only be considered by this Court at this time if significant actions were taken under the regulations which, standing alone, would be of sufficient importance to justify the grant of writs of certiorari to consider the two questions presently before the Court. It must be determined whether "[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969), quoted in *Diffenderfer* v. *Central Baptist Church*, *supra*, 404 U.S. at 414.

In *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), this Court considered whether a writ of certiorari should be dismissed because of facts which emerged after it was granted. This Court held that the facts which "must be weighed in the exercise of that 'sound judicial discretion'" are the same as those which govern the grant or denial of petitions for writ of certiorari. *Id.* at 77. The Court explained (*id.* at 79):

> In the words of Mr. Chief Justice Taft, speaking for a unanimous Court: "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where

there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393.

In the *Rice* case, the Court cited an impressive list of cases that were dismissed even after full argument. *Id.* at 78.

There can be little doubt that the granting of writs of certiorari would not be justified in the present situation. The regulations have no independent application to actions taken after August 7, 1977. Almost no actions were taken under the regulations prior to that date. Only one area had been redesignated, the redesignation by the Northern Cheyenne Tribe of their reservation as a Class I area. 42 Fed. Reg. 40695. A number of the pollution sources had sought, and been granted, permits but, as far as intervenors are aware, no source had been denied one.[5]

If the issue concerning the justification for this Court's review of this case, based on the present situation, were far more doubtful, we submit that the questions in this case should first be considered by the Court of Appeals in light of the recent statute. Consequently, if this Court does not simply dismiss as moot, we submit that the proper course would be to remand the cases to the Court of Appeals for determination of the effect of the new law on the regulations, as to the period prior to August 7, 1977. The determination of the Court of Appeals could then be considered by this Court to determine whether granting writs of certiorari would be justified.

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[5] A few challenges to the requirement of a permit are pending in the courts.

CONCLUSION

For the reasons stated above, intervenor respondents request that these consolidated proceedings either be dismissed as rendered moot by the passage of the Clean Air Act Amendments of 1977 or be remanded to the Court of Appeals for consideration in the light of the newly enacted legislation.

Respectfully submitted,

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